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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

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FILE:

Office: PHOENIX, ARIZONA

Date: DEC 02 2010

IN RE:

APPLICATION:

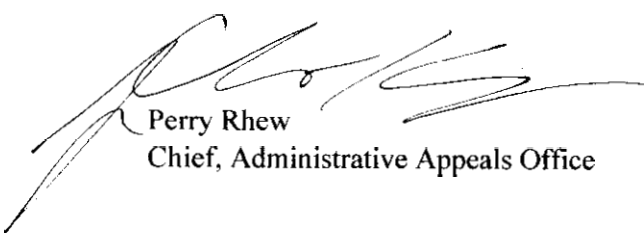
Application for Certificate of Citizenship under former section 301 of the Immigration and Nationality Act; 8 U.S.C. § 1401 (1960)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,


Perry Rhew

Chief, Administrative Appeals Office

DISCUSSION: The application was denied by the Field Office Director, Phoenix, Arizona, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The record reflects that the applicant was born in Mexico on December 1, 1960, to married parents [REDACTED]. The applicant's father was born in the United States on May 23, 1921. The applicant's mother was born in Mexico and was not a U.S. citizen at the time of the applicant's birth. The applicant seeks a certificate of citizenship pursuant to former section 301(a)(7) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1401(a)(7), based on the claim that she acquired U.S. citizenship at birth through her father.

The Field Office Director found that the applicant failed to establish that her father was physically present in the United States for the requisite period prior to the applicant's birth, as required by former section 301(a)(7) of the Act. *See Decision of the Field Office Director*, dated June 2, 2010. The application was denied accordingly. *Id.* On appeal, the applicant claims through counsel that the evidence is sufficient to show that her father was physically present in the United States during the applicable time periods. *See Form I-290B, Notice of Appeal*, filed June 30, 2010; *Brief in Support of Appeal*.

The AAO conducts appellate review on a de novo basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The applicable law for transmitting citizenship to a child born abroad when one parent is a U.S. citizen is the statute that was in effect at the time of the child's birth. *See Chau v. INS*, 247 F.3d 1026, 1028 n.3 (9th Cir. 2001). The applicant in this case was born in 1960. Accordingly, former section 301(a)(7) of the Act controls her claim to acquired citizenship.¹

Former section 301(a)(7) of the Act stated that the following shall be nationals and citizens of the United States at birth:

a person born outside the geographical limits of the United States . . . of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States . . . for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years. . .

The applicant must therefore establish that her father was physically present in the United States for no less than ten years before her birth on December 1, 1960, and that at least five of these years were after her father's fourteenth birthday on May 23, 1935. *See id.*

The record includes the following evidence relating to the applicant's father's physical presence in the United States during the relevant periods: a birth certificate for [REDACTED]

¹ Former section 301(a)(7) of the Act was re-designated as section 301(g) by the Act of October 10, 1978, Pub. L. No. 95-432, 92 Stat. 1046 (1978). The requirements of former section 301(a)(7) remained the same after the re-designation and until 1986.

indicating that the applicant's father was born in El Paso, Texas on [REDACTED] school records for [REDACTED] an affidavit from [REDACTED] providing information regarding his education and work history in the United States, dated May 28, 1998; and two affidavits from the applicant's paternal aunt, dated March 18, 2002 and June 23, 1998. The applicant also submitted selections from a biography of the applicant's paternal great grandparents; pages from the El Paso City Directory for 1921, 1922 and 1937 – 1945, and a digitized federal census record for 1930.

The record also includes the decision of the immigration judge terminating the applicant's removal proceedings based on a finding that the applicant acquired U.S. citizenship through her father. *See Written Decision of the Immigration Judge*, dated Apr. 19, 2002. Following a hearing during which testimony was provided by the applicant's paternal aunt, the immigration judge found that the applicant's father was physically present in the United States for a total of 16 years before the applicant's birth, 13 of which were after her father's fourteenth birthday.

U.S. Citizenship and Immigration Services (USCIS) is not bound by a determination of the Executive Office for Immigration Review (EOIR) that an applicant is a U.S. citizen. An immigration judge may credit an individual's citizenship claim in the course of terminating removal proceedings for lack of jurisdiction because the government has not established the individual's alienage by clear and convincing evidence. *See* 8 C.F.R. § 1240.8(a), (c) (prescribing that the government bears the burden of proof to establish alienage and removability or deportability by clear and convincing evidence). The immigration judge's decision regarding citizenship, however, is not binding on USCIS. USCIS retains sole jurisdiction to issue a certificate of citizenship and the agency's decision is reviewable only by the federal courts, not EOIR. Sections 341(a) and 360 of the Act, 8 U.S.C. §§ 1452(a), 1503; 8 C.F.R. 341.1; *see also Minasyan v. Gonzalez*, 401 F.3d at 1074 n.7 (noting that the immigration court had no jurisdiction to review the agency's denial of Minasyan's citizenship claim). In addition, while the government bears the burden of proof to establish an individual's alienage in removal proceedings before EOIR; in certificate of citizenship proceedings before USCIS, the applicant bears the burden of proof to establish the claimed citizenship by a preponderance of the evidence. Section 341(a) of the Act, 8 U.S.C. § 1452(a); 8 C.F.R. § 341.2(c).

Although the immigration judge's finding regarding the applicant's citizenship is not binding on these proceedings, the record established before the immigration judge provides probative evidence relevant to the N-600 application. Here, the immigration judge credited the testimony provided by the applicant's paternal aunt as generally reliable, detailed, cohesive, and supported by the documentary evidence in the record. *See Written Decision of the Immigration Judge*, at 10. Specifically, the applicant's paternal aunt testified that the applicant's father was born in El Paso, where he lived with his family until 1924 when the children moved to Mexico with their mother. *Id.* at 4-5. The applicant's father returned to the United States with his brother and mother in 1927, and his brother was killed in a farming accident. *Id.* at 5. The applicant's father again returned to the United States around 1936, and he lived with the applicant's paternal aunt in El Paso beginning in or around 1939. *Id.* at 5-6.

Here, the record supports the applicant's contention that her father was physically present in the United States for the requisite time periods. First, the evidence shows that the applicant's father was

born in the United States and lived here until he and his siblings moved to Mexico with their mother in 1924, a period of three years. *See Birth Certificate of [REDACTED] Written Decision of the Immigration Judge*, at 4-5; *Affidavit of [REDACTED]* dated Mar. 18, 2002.² Second, the applicant's father returned to the United States with his mother and brother for approximately six months in 1927. *Affidavit of [REDACTED]* dated Mar. 18, 2002; *Written Decision of the Immigration Judge*, at 5. Third, the applicant's father returned to the United States in 1935 to attend Brigham Young High School. *Affidavit of [REDACTED]; Letter from [REDACTED]* dated Dec. 3, 1981; [REDACTED]. Although the immigration judge found that the applicant's father was present in the United States from 1935 until 1946, a period of 11 years, the evidence shows that he attended school in Mexico from 1936 until 1940. *See Juarez Stake Academy Transcript*. Accordingly, the record only supports a finding that the applicant's father was present for seven years during that period. *See Affidavit of [REDACTED]* (indicating attendance Brigham Young University in 1940, draft registration, and work during this period for J.P. Morgan Construction Company, R.R. Express Co., an electric substation, and mines in Arizona); *see also Affidavits of [REDACTED]* (stating that the applicant's father resided with her and her husband in El Paso, Texas, when he was employed there). Fourth, the applicant's father worked in Lubbock, Texas doing odd jobs and with a construction company that built grain elevators for a year between 1948 and 1949. *Affidavit of [REDACTED]* Fifth, the applicant's father worked in Hachita, New Mexico and Detroit, Michigan for a year between 1953 and 1954. *Id.* Accordingly, the preponderance of the evidence in the record indicates that the applicant's father met the physical presence requirements set forth in former section 301(a)(7) of the Act.³

The applicant bears the burden of proof to establish the claimed citizenship by a preponderance of the evidence. Section 341 of the Act, 8 U.S.C. § 1452; 8 C.F.R. § 341.2(c). The applicant has established by a preponderance of the evidence that her father was physically present in the United States for a ten-year period before her birth in 1960, and that at least five of those years were after her father's fourteenth birthday in 1935. Accordingly, the applicant is eligible for citizenship under former section 301(a)(7) of the Act. The appeal will be sustained, the decision of the director will be withdrawn, and the matter will be returned to the director for the issuance of a certificate of citizenship.

ORDER: The appeal is sustained. The matter is returned to the Phoenix Field Office for issuance of a certificate of citizenship.

² Although the affidavits in the record state that the applicant's father resided in the United States from 1921 until 1927, the immigration judge credited the hearing testimony that the applicant's father moved to Mexico with his mother in 1924, and that he returned to the United States with her for a short time in 1927. *Written Decision of the Immigration Judge*, at 11.

³ USCIS records show that the applicant's brother was granted a certificate of citizenship based on the same evidence of their father's birth and presence in the United States that was presented in the instant case. *See* A78 919 024.